STATE OF MICHIGAN

COURT OF APPEALS

DENNIS GOODMAN,

Plaintiff-Appellant,

v

GENESEE COUNTY,

Defendant-Appellee.

UNPUBLISHED
January 24, 2008

No. 275616
Genesee Circuit Court
LC No. 04-080516-CD

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In this race discrimination action, plaintiff appeals as of right from a circuit court order granting defendant's motion for reconsideration and summarily dismissing plaintiff's claim pursuant to MCR 2.116(C)(10). We reverse and remand.

I. Underlying facts & procedure

This case began in December 2004, when plaintiff filed a complaint alleging that defendant terminated his employment as its motor pool administrator "in substantial part" because of his Caucasian race, in violation of the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and that defendant's termination of his employment constituted unlawful retaliation under both the ELCRA and the whistleblowers' protection act (WPA), MCL 15.361 *et seq*. The circuit court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), concluding that plaintiff failed to create any genuine issues of material fact to support those claims.

On appeal, this Court reversed the circuit court's dismissal of plaintiff's race-based termination claim, explaining in relevant part as follows:

> Claims that present direct evidence of racial animus are commonly referred to as "mixed motive" or "intentional discrimination claims." In such cases, the plaintiff must show: (1) that he is a member of a protected class, (2) an adverse employment action, (3) that the employer was predisposed to discriminating against members of the plaintiff's protected class, and (4) that the employer actually acted on that predisposition in visiting the adverse employment action on the plaintiff. . . .

Here, the parties contest whether plaintiff has created a genuine issue of material fact regarding whether defendant may be said to have been predisposed to discriminating, and to have acted on the predisposition, in choosing to reorganize the motor pool and eliminate plaintiff's position in the process. Plaintiff focuses his argument on an e-mail message that he alleges was sent to him by [his supervisor Eric] Hopson on the day before the September 28, 2004 meeting at which defendant's board of commissioners voted to adopt a budget that, among other things, eliminated plaintiff's position. In addition to requesting motor pool fleet information from [plaintiff], this email states: "(B)eing white and so autonomous in your position for so many years, I bet you think the board will listen to you tomorrow. You'll find out different, they listen to me now. (¶) You people seem to think that you can get away with anything but things have changed around here now."

. . . We agree that Hopson's e-mail message, when viewed in a light most favorable to plaintiff, provides direct evidence of animus . . . . The e-mail message refers to plaintiff's race and, simultaneously, clearly refers to the board's upcoming vote on whether to eliminate plaintiff's position, and Hopson's intent to influence the board. *These remarks constitute ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action.*

The trial court acknowledged this direct evidence of discrimination, but incorrectly concluded that this evidence was essentially irrelevant given that it was the board, and not Hopson, that ultimately decided to eliminate plaintiff's position. . . .

Here, . . . the board appears to have received substantial input from Hopson. . . .

We reject defendant's argument that Hopson's input was essentially irrelevant because the initial [reorganization] assessment provided by the independent contractor also eliminated plaintiff's position. Rather, we find that plaintiff has created a genuine issue of material fact regarding whether he would have remained eligible for employment if the initial assessment had been adopted. . . .

* * *

We reiterate that summary disposition is not proper here, where there is direct evidence of discrimination, merely because the board is not charged with animus and because defendant has provided significant evidence of its legitimate reasons for adopting Hopson's plan. Rather, because plaintiff has provided factual support for his argument that Hopson provided the primary input into the board's decision, this case is not distinguishable, for instance, from more typical cases in which a supervisor makes a racially motivated decision that is automatically sanctioned and carried out by the defendant organization, which may then be liable based on respondeat superior. If a person who is improperly

> motivated gives significant input into a decision—even if his or her input is phrased innocently—such biased input may meet the plaintiff's burden to show that animus was a substantial or motivating factor in the eventual decision. *In cases where a plaintiff has provided direct evidence of discrimination, we must leave it to the fact-finder to consider the meaning of the apparently discriminatory remarks and to weigh the evidence of discrimination against the evidence supporting the defendant's claim that it would have reached the same decision without consideration of the plaintiff's race*. The trial court erred by dismissing plaintiff's racial discrimination claim merely because the board was the ultimate decision-maker. Remand is warranted for this reason. [*Goodman v Genesee Co*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2006 (Docket No. 266955), slip op at 2-5 (citations, footnote and internal quotations omitted, emphasis added).]

This Court affirmed the circuit court's dismissal of plaintiff's unlawful retaliation claims, which are not at issue in the instant appeal. *Id*. at 5-8.

Within three months after this Court's remand, defendant again moved for summary disposition of plaintiff's discriminatory termination claim pursuant to MCR 2.116(C)(10). Defendant maintained that plaintiff could make no showing of any adverse employment action premised on Hopson's allegedly racist reorganization recommendation. According to defendant, plaintiff undisputedly occupied "the same position as he would have been [in] if [defendant] had rejected the proposal by Mr. Hopson, and had instead adopted the proposal that was proffered by the independent consultants hired to analyze Motor Pool functions." Defendant contended that no adverse employment action existed in light of the undisputed facts that (1) Hopson and the independent consultant both recommended elimination of plaintiff's position as motor pool administrator, (2) the independent consultant urged the division of plaintiff's former motor pool administrative duties into two new positions, (3) plaintiff did not qualify for the first recommended position of fleet manager because it involved "assisting with hands on fleet maintenance activities," and plaintiff did not hold a mechanic's license, and (4) although plaintiff arguably qualified for the second recommended position of fleet operations assistant, (a) defendant's human resource director, Jack Witt, opined in an affidavit that the "position of Fleet Operations Assistant is in the nature of the position of Secretary in terms of job duties and responsibilities," for which defendant offered a "top base rate of pay . . . [of] $20.8220 per hour," (b) plaintiff currently remained in defendant's employ as "a Secretary in the Health Department," where he earned $20.8220 an hour, and (c) to the extent plaintiff might have wished to remain in the motor pool, the unfulfillment of his merely subjective desire to work there did not qualify as an adverse employment action cognizable under the ELCRA.

Plaintiff responded that the circuit court had to apply the law of the case as determined by this Court during the prior appeal, in which the Court held that questions of fact existed regarding whether racial discrimination motivated plaintiff's termination and whether he held sufficient qualifications for other positions. With respect to the existence of an adverse employment action, plaintiff additionally asserted that his acceptance of his current secretarial position involved "entirely different" job duties, significantly less income, and a diminished job title, and occasioned the loss of his technical and professional seniority rights.

Defendant replied that the law of the case doctrine did not apply because this Court did not previously consider two recently obtained affidavits establishing that (1) plaintiff would not have qualified for the fleet operations manager position recommended by the independent consultant, and (2) the recommended fleet operations assistant position would have offered pay and other benefits concurrent with those awarded by plaintiff's current position. Defendant attached to its reply brief a supplemental affidavit by Witt attesting as follows:

> 5. The job duties and responsibilities for Fleet Operations Assistant as provided by the Mercury study do not include substantial duties of a professional/technical nature.
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> 6. The job duties and responsibilities for Fleet Operations Assistant as provided by the Mercury study fit with those of Local 496-00, which is the bargaining unit for clerical and maintenance workers, and do not fit with those of Local 496-01, which is the bargaining unit for professional/technical personnel.
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> 7. The former Motor Pool Administrator position was included in the Local 496-01 bargaining unit.
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> 8. Plaintiff is currently a member of the Local 496-00 bargaining unit.
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> 9. Any loss of seniority experienced by Plaintiff was a result of his transfer from one bargaining unit to another, i.e. his transfer from Local 496-01 to Local 496-00.
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> 10. This same transfer (from Local 496-01 to Local 496-00) would have occurred if the Fleet Operations Assistant position had been created and if Plaintiff had been placed in that position.

On the same day defendant filed its reply brief, it filed separately a November 21, 2006 affidavit of Tony Yankovich, the Mercury Associates, Inc. employee who performed the independent assessment of defendant's motor pool. In relevant part, Yankovich declared that, "although it is not set forth in the description for the job, . . . the individual who would be in the position of Fleet Manager would have to be a certified/licensed mechanic able to perform the required mechanical work on the vehicles on demand, so that this person could fully perform all aspects of the required position."

At a summary disposition hearing on November 27, 2006, the circuit court explained in relevant part as follows that it would deny the motion:

> . . . [T]o the extent that the[] [Court of Appeals] felt that it was appropriate to—to find that the Board—even though, as decision makers, taking Ho[p]son's information into consideration was poison[ed], and therefore, um, in at least the Court of Appeals' decision, the Board was improper in—in their actions and so this is gonna have to go back I guess before a jury because they felt that the Board, quite frankly, stood in the shoes of Ho[p]son, in a sense, and—and upheld his position on this; and they felt that Ho[p]son, certainly may have some issues

with respect . . . to racial animus and the real purpose for which he was presenting—presenting the proposal that the Board ultimately adopted.

So, for those reasons, I'm gonna deny it, and it's gonna go forward to trial at this point on all the issues, including the issue of whether in fact he was qualified for the higher position. . . .

Seven days after the court entered an order denying the motion for summary disposition, defendant filed a motion for reconsideration. Defendant emphasized that plaintiff had introduced no evidence tending to rebut its affidavits establishing that, irrespective of Hopson's potential racial animus, it would have eliminated plaintiff's job, and he would occupy a position nearly identical to that he currently occupied. Plaintiff filed a lengthy brief reiterating that the evidence accompanying defendant's second motion for summary disposition did not alter this Court's prior conclusion that issues of material fact precluded summary disposition. At a hearing on the motion, after questioning the parties and taking into account their positions, the circuit court reasoned as follows that it would grant reconsideration:

All right. Thank you, gentlemen. I've heard the arguments. What I have before me is a motion for reconsideration under MCR 2.119(F). When the Court's considering a motion for reconsideration, it has to determine whether or not it committed a palpable error or is there new evidence that the Court had not considered before.

In the second summary disposition motion, as I'm gathering so far, there are at least two affidavits, uh, at least on two separate points, that were submitted in the . . . second summary disposition motion, one having to do with the issue of the qualifications to have the higher paying job. The second affidavit, of course, having to do with the question of whether or not, . . . if the initial assessment had been considered, would . . . Plaintiff—would his job have been eliminated in any event.

As I can gather, neither of those affidavits have been met with evidence—with an affidavit to meet the challenge. Under . . . [a] motion for summary disposition, . . . the opposing party can't just sit on—on its mere allegations; it has to submit affidavits that are contrary to the ones that have been filed or at least create a question of fact. In this case, as far as I can tell, those affidavits have not been filed; and so, when I ruled on the second motion for summary disposition, this Court believes it did commit a palpable error, because it did not take into consideration those additional . . . affidavits that had been filed on behalf of the County, . . . in assessing whether a summary disposition should be granted; and, because of that, I am gonna grant the motion for reconsideration; and now the question is would I grant the summary disposition motion.

I would have to grant it if the affidavits that have been filed have not been—there's been no challenge to those affidavits and those affidavits are critical to the determination of this action. When you look at the Court of Appeals opinion, they clearly say that we find that Plaintiff has created a genuine issue of material fact regarding whether he would have remained eligible for

> employment if the initial assessment had been adopted. The affidavits remove that question of fact since they have not been challenged; and so I do think it would be appropriate to grant summary disposition on behalf of . . . Defendant, based on the fact that the affidavit involving the initial assessment has not been challenged and also, as far as I can tell—I don't know who the affiant is, if there was an affiant, on the question of whether the—I'm losing my train of thought here. But the second point, also, there's been no affidavit to challenge it; and so I would grant summary disposition.

On January 9, 2007, the circuit court entered a brief order granting defendant's motion for reconsideration and granting defendant's motion for summary disposition "regarding the reverse discrimination claim."

II. Issues presented & analysis

Plaintiff now challenges the propriety of the circuit court's January 2007 order. This Court reviews for an abuse of discretion a trial court's ultimate decision on a motion for reconsideration, but considers de novo any involved issues of law. *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006). This Court also reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When reviewing a motion premised on MCR 2.116(C)(10), which tests a claim's factual support, "this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*.

Plaintiff first contends that the circuit court erred by ignoring the law of the case doctrine. Whether the law of the case doctrine applies constitutes a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. . . . However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law. [*Ashker*, *supra* at 13.]

The law of the case doctrine likewise does not govern subsequent reexamination of an issue decided on appeal if the underlying facts have materially changed. *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000); *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

Plaintiff correctly observes that in the course of its prior decision in this case, this Court determined that genuine issues of material fact existed concerning whether (1) defendant acted with racial animus in eliminating plaintiff's job, and (2) plaintiff would have qualified for either alternate position envisioned by the independent contractor's reorganization assessment. *Goodman*, *supra*, slip op at 2-5. Regarding the latter determination, the Court took into account that "there is no evidence that these positions would have required mechanics' certification," as defendant contended. *Id*. at 4. Defendant filed in support of its second motion for summary

disposition affidavits not previously supplied to this Court, which tended to establish, among other things, that the imagined position of fleet manager would have required licensure as a mechanic. Because the second motion for summary disposition presented material facts that this Court did not consider in the prior appeal, the circuit court did not err by considering the new evidence when ruling on the latter motion.

Plaintiff also asserts that the newly supplied affidavits did not support the circuit court's conclusion as a matter of law that he did not suffer an adverse employment action. The affidavits of Mercury consultant Yankovich and county human resource director Witt prepared in November 2006 focused on defendant's potential qualification for the recommended fleet manager position, which Yankovich opined would require certification as a mechanic, and on Witt's comparison of county employment positions with "the description of job duties for the two positions [fleet manager and fleet operations assistant] created by the Mercury study." Although the Yankovich and Witt affidavits introduced facts not previously considered in this Court's prior summary disposition ruling, we find that the newly introduced facts do not undermine this Court's prior denial of summary disposition to defendant.

The central question presented here and in his previous appeal is whether plaintiff presented sufficient evidence to support a prima facie case of racial discrimination. Defendant contends that the two affidavits filed after this Court rendered its previous decision demonstrate that plaintiff cannot prove an adverse employment action.

The Yankovich affidavit addressed the job qualifications required for the fleet manager position. However, plaintiff's lack of qualification for the position of fleet manager is irrelevant to whether racial animus motivated, at least in part, defendant's decision to reorganize the motor pool, and to eliminate plaintiff's motor pool job.[1] As this Court observed in its previous opinion, Hopson provided the board "substantial input" regarding a possible reorganization of the motor pool. "At a minimum," as we stated on page 5 of our previous slip opinion, "there exists a genuine issue of fact regarding whether plaintiff would have been qualified for the Fleet Operations Assistant position." As this Court concluded in its previous opinion, plaintiff created a genuine issue of fact regarding whether racial animus was "at least a factor in defendant's decision to reorganize the motor pool and to eliminate plaintiff's previous position." Plaintiff's failure to qualify for the fleet manager position is therefore irrelevant to the determination whether he suffered an adverse employment action.

Admittedly, the existence of Yankovich's alternate plan, which like Hopson's recommended the elimination of plaintiff's motor pool administrator position, might tend to assist defendant's efforts to convince a jury that it did not act on the basis of prejudice when it terminated plaintiff's employment. But the evidence regarding plaintiff's potential status under the alternate, unadopted plan does not remove the case from the jury's consideration.

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[1] Hopson's communication to plaintiff referencing race occurred only days before the board met to discuss a possible reorganization of the motor pool.

The Witt affidavit addresses the contested adverse employment issue more directly. In our view, however, there remains a substantial question of fact regarding whether the board's decision to eliminate plaintiff's position, and plaintiff's ultimate assignment to work as a secretary in defendant's health department, constituted an adverse employment action.

When reviewed under the standard applicable to a (C)(10) motion, the Witt affidavit does not change the fact that evidence supports each requisite element of plaintiff's discriminatory termination claim, namely: (1) that he is a member of a protected class, (2) that he endured an adverse employment action, i.e., the elimination of his position and the termination of his employment, before defendant rehired him at a substantially lower salary, (3) that defendant had a predisposition to discriminate against Caucasians, which element plaintiff substantiated with direct evidence of his supervisor Hopson's discriminatory attitude, and (4) that defendant actually acted on this predisposition in visiting the adverse employment action on plaintiff, which found support in evidence that Hopson gave input into defendant's ultimate decision to reorganize. *Goodman*, *supra*, slip op at 2-4. Based on the record before us, we cannot conclude that plaintiff's new secretarial job is not a "materially adverse" employment change. Plaintiff's affidavit reflects that he previously worked as a manager, and lost all seniority with regard to technical and professional positions within the county. Additionally, plaintiff contests the wage figures contained in the Witt affidavit. We believe that questions of fact remain as to whether plaintiff suffered an adverse employment action, and that a jury must resolve these questions. *Harrison v Olde Financial Corp*, 225 Mich App 601, 612-613; 572 NW2d 679 (1997).

In summary, the law of the case doctrine does not govern the ruling on defendant's second motion for summary disposition. However, the newly presented evidence does not counter as a matter of law, and remove from the jury's consideration, the genuine issues of fact that plaintiff previously established concerning each element of his discriminatory discharge claim under the ELCRA. Because the evidence defendant submitted with its second summary disposition motion did not defeat plaintiff's prima facie case, we conclude that the circuit court abused its discretion in granting defendant's motion for reconsideration, and that the court erred by granting the second motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher